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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, - vs. – AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO)
AUSTRALIAN GOLD, INC., Third Party Plaintiff, - vs. – LARRY SAGARIN AND JOHN DOES 1-10, Third Party Defendants.	

AUSTRALIAN GOLD'S RESPONSE TO S&L VITAMINS' STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1

Defendant/Counterclaim Plaintiff, Australian Gold, Inc., by counsel, for its Response to Plaintiff/Counterclaim Defendant S&L Vitamins' and Third-Party Defendant Larry Sagarin's Statement of Material Facts Regarding Which There is No Genuine Dispute Pursuant to Local Rule 56.1, states:

Local Rule 56.1 Statement

PROPOSED UNDISPUTED FACT	RECORD SUPPORT
1. S & L Vitamins, Inc., is a New York corporation with a principal place of business in New York.	**2nd Amended Answer With Counterclaims & Third Party Complaint ("2nd Am. Ans. & Counterclaims") at ¶ 13 of Counterclaims**
Australian Gold admits this statement of fact.[1]	
2. S & L operates its retail business, located in Lindenhurst, New York and Miller Place, New York, under the name "Body Source."	**2nd Am. Ans. & Counterclaims at ¶¶ 7, 29-30 of Counterclaims**
Australian Gold admits this statement of fact.	
3. Larry Sagarin Dep. is an employee of S & L Vitamins, Inc.	**2nd Am. Ans. & Counterclaims at ¶ 9 of Counterclaims; Sagarin Dep. 36:22-24**
Australian Gold admits this statement of fact.	
4. Defendant Australian Gold, Inc. ("AG") is a Delaware Corporation with a principal place of business in Indianapolis, Indiana.	**2nd Am. Ans. & Counterclaims at ¶ 1 of Counterclaims**
Australian Gold denies that it is a Delaware Corporation, but admits that it is an Indiana corporation with its principal place of business in Indianapolis, Indiana	2nd Am. Ans. & Counterclaims at ¶ 1 of Counterclaims
5. AG manufactures tanning lotions and other related tanning products ("AG Products").	**2nd Am. Ans. & Counterclaims at ¶ 2 of Counterclaims**
Australian Gold admits this statement of fact.	

[1] Australian Gold admits the facts in this response only for purposes of summary judgment and reserves the right to dispute and contest any fact at trial.

6. AG owns or is the licensee of various trademarks for AG Products ("Marks").	**2nd Am. Ans. & Counterclaims at ¶¶ 2-3 of Counterclaims**
Australian Gold admits this fact but further states that it sells its tanning products under the brand names Australian Gold®, Swedish Beauty® and Caribbean Gold®. Additional trademarks are used in connection with specific tanning products in each of the three product brands. Australian Gold is the owner of the numerous federally registered trademarks used in connection with its tanning products, including:	2nd Am. Ans. & Counterclaims and Exhibit A thereto.

Trademark	**Registration No.**	**Goods**
AUSTRALIAN GOLD	1046627	sun-screen lotion
AUSTRALIAN GOLD	1637325	skin care preparations, namely suntanning and moisturizing creams and lotions
SWEDISH BEAUTY	1928801	cosmetic preparations; namely, tanning accelerator lotions.
CARIBBEAN GOLD	1626563	suntan lotion
AMARETTO	2460088	sun tanning preparations
BEACH IN A BOTTLE	2805539	suntanning preparations
BLAZIN'	2813783	suntanning preparations
BRONZING FIRE	2751259	suntanning

GLAZE		preparations	
BROWNING FURY	2615956	suntanning preparations	
CHOCOLATE INDULGENCE	2630659	suntanning preparations	
CHOCOLATE TEMPTATION	2847976	suntanning preparations.	
DANGEROUSLY DARK	2867616	suntanning preparations	
DARK FIRE	2743410	suntanning preparations	
FAST ACTION	2273959	suntanning preparations	
FAST BROWN	2744672	suntanning preparations	
FROSTED HEMP	2744671	suntanning preparations	
GOLDEN BRONZING GLAZE	2541714	suntanning preparations	
GOLDEN GLAZE	2480954	suntanning preparations	
GOLDEN TINGLING GLAZE	2722211	suntanning preparations	
HOT AMARETTO	2867617	suntanning preparations	
HOT!	1961084	suntanning preparations	
ICED CRÈME	2373618	suntanning preparations.	
INTIMIDATION	2856626	suntanning	

preparations SAFIRE 2751260 suntanning preparations. SINFUL 2384202 suntanning preparations SMOKIN' 2716327 suntanning preparations SMOOTH SOFTIE 2854529 suntanning preparations SWEDISH BRONZING CRÈME 2743478 suntanning preparations SWEDISH INTENSIFIER 2400983 sun tanning preparations THRUST 2005289 suntanning preparations WILD 1993799 suntanning preparations YOU WISH! 2744670 suntanning preparations	
7. **S & L operates Internet websites at www.thesupplenet.com and www.bodysourceonline.com.**	**2nd Am. Ans. & Counterclaims at ¶ 7 of Counterclaims**
Australian Gold admits this statement of fact.	
8. **S & L's websites offers discount prices on a wide selection of premium tanning products, including those of AG.**	**March Opinion at 3**
Australian Gold objects to the citation to the Court's opinion on the Motion to Dismiss because it is not proper evidence for summary judgment. Every statement of fact by a movant must be followed by citation to evidence which would be admissible. *See* L.R. 56.1(d), *U.S. Information Sys., Inc. v. Int'l Brotherhood of Elec. Workers Local Union No. 3*, 2006 U.S. Dist. LEXIS 52870 (S.D.N.Y. 2006).	

Notwithstanding this objection, Australian Gold objects to the sale of its Products on the internet at any price.	
9. AG Products sold by S & L are authentic AG products.	**March Opinion at 7**
Australian Gold objects to the citation to the Court's opinion on the Motion to Dismiss for the reasons set forth above in its response to paragraph 8. Further, Australian Gold disputes this statement of fact. There are questions of fact whether the Products being sold by S & L are genuine because S & L does not offer the training and instruction on the proper use of the Products, which is a required component of the sale of Products to retail customers. Further, Australian Gold has Distributorship Agreements with each of its authorized distributors. Australian Gold's Distributorship Agreements permits sales only to tanning salons that offer training and instruction on the use of the Products. Australian Gold provides extensive training to its distributors and to tanning salons on the proper use of its Products. Australian Gold maintains a training department that meets with and sends trainers to tanning salons to instruct salon owners, managers and employees in the proper use of Australian Gold's Products. In a typical year, Australian Gold's training department meets with and trains over 30,000 people and conducts over 600 presentations. Australian Gold requires its distributors to participate in training programs and to make their sales associates available twice a year for additional training. Distributors are further required to attend two seminars each year regarding the training of tanning salons in the proper use of Australian Gold's Products. In addition, Australian Gold hosts a yearly distributor's council, in which it provides additional training to its distributors. Further, S & L admitted that it has sold Products which are intended only for sale in the Unites States into the European market. Thus, there are material facts as to whether the Products sold by Australian	Hartlieb Dep. 83:17-21, 83:17-84:2; Australian Gold Resp. to Interrog. No. 9; Distributorship Agreement, Hartlieb Dep. at Ex. 2; Mercadante Dep. 210:21-218:25 and Ex. 19 thereto.

Gold are genuine.	
10. **AG Products sold by S & L on its www.thesupplenet.com website are purchased by S & L only at retail tanning salons.**	**Sagarin Dep. 58:10-59:6, 60:2-61:2**
Australian Gold disputes this statement of fact. Australian Gold believes that S & L has conspired to obtain the Products from a distributor. Under the Distributorship Agreement, distributors may only sell to "Customers," which are defined as "a person (a) whose primary business activity is operating a tanning salon or hair case salon and beauty care salon; (b) who offers approved indoor tanning and instruction on the use of the Products as an on-premises service; and (c) who obtains training and instruction on matters related to the use of the Products from [Australian Gold] or one of [Australian Gold's] distributors." Any tanning salon that "buys on behalf of other resellers" is excluded from the definition of a "Customer," and a distributor may not sell the Products to such an entity. Thus, Yucatan Tanning and Danny Sheehan, are not "Customers" under the Agreement. S & L and Yucatan conspired to circumvent the Distributorship Agreement by using Yucatan, Inc. and other retail tanning salons as a conduit for purchases directly from a distributor. For example, S & L would call in its orders to Yucatan and Yucatan would then place a telephone call to one of Australian Gold's authorized distributors to place S & L Vitamins' order. Yucatan then notified S & L when its order was delivered by the distributor to Yucatan's place of business. S & L would pick up its shipment and compare what was shipped with the products invoiced by the distributor. S & L, not Yucatan, would take the invoice from the distributor. S & L would then add a 10-20% mark-up and send Yucatan a check for that amount. *See also* Response to Statement of Fact No. 24. Australian Gold believed that S & L was directly or indirectly dealing with a distributor because a retail tanning salon will not carry every Product listed for	Distributorship Agreement, Hartlieb Dep. Ex. 2 at Art. 1.1(D); Mercadante Dep. 102:16-106:4; 111:19-113:7; 154:22-156:18; 157:4-158:2; Sagarin Dep. 83:21-84:12; Hartlieb Dep. 118:13-20.

sale on S & L's website, which represented Australian Gold's complete line of Products.	
11. S & L has never attempted to purchase AG Products from or otherwise communicated with Distributors	**Mercadante Dep. 101:15-17, 66:10-13; Sagarin Dep. 80:8-14**
Australian Gold disputes this statement of fact. See Responses to Statement of Material Fact Nos. 10 and 24.	
12. AG distributes its Products through independent distributors ("Distributors") whose ability to resell AG Products is limited by the terms of a "Distribution Agreement" which contains, inter alia, a counter-party limitation and a geographic limitation.	**March Opinion at 3**
The Distributorship Agreement is a document that speaks for itself. The limitations on the sale and distribution of the Products are set forth in the Distributorship Agreement. Australian Gold further states that it distributes its Products through a network of 43 distributors and approximately 70 subdistributors. Australian Gold only authorizes the sale of its Products to the public through tanning salons. Each distributor must enter into a distribution contract that restricts the resale of Australian Gold's products to "a salon environment where they have tanning as a majority of their business."	Distributorship Agreement, attached to the 2nd Am. Ans. & Counterclaims at Ex. C; Hartlieb Dep. 32:23-33:12; 38:13-19, 46:1-9)
13. The counter-party limitation provides that AG Products only be sold to "legitimate tanning salons and hair care salons that offer indoor tanning as an on premises service and instruction on the use of AG Products." Sales by the Distributors to Internet sellers and other retailers who will re-sell the product to the general public are prohibited.	**March Opinion at 3-4**
The Distributorship Agreement is a document that speaks for itself, but Australian Gold admits this statement of fact.	
14. On January 15, 2004, S & L's principals received a letter from counsel for ETS, Inc.,	**2nd Am. Ans. & Counterclaims at ¶ 23**

which then owned Australian Gold, Inc., at the Body Source in Lindenhurst, New York (the "January 15, 2004 Letter").	**of Amended Answer**
Australian Gold admits this statement of fact.	
15. **The January 15, 2004 Letter accused S & L of trademark infringement and intentional interference with defendant's contracts with its distributors in connection with S & L's sale of the AG Products and making various demanding that S & L (a) remove all references to Australian Gold from its website, (b) cease and desist from selling AG Products, and provide extensive purchase, supply and pricing information to defendant under threat of litigation.**	**2nd Am. Ans. & Counterclaims at ¶ 24 of Amended Answer**
The January 24, 2005 letter is a document that speaks for itself.	
16. **At the time of the January 15, 2004 letter, AG had no actual knowledge that S & L was purchasing AG Products from any party other than a retail salon but believed this to be the case based on speculation.**	**Answer, ¶ 80; Hartlieb Dep. 114:25-119:13**
Australian Gold disputes this statement of fact. Leslie Hartlieb testified that Australian Gold had a reasonable belief that S & L was obtaining the Products through a distributor because S & L had every single Product for sale on the website and tanning salons do not carry every single Product. Thus, the orders made by S & L had to be through a distributor.	Hartlieb Dep. 118:9-119:13.
17. **At the time of the January 15, 2004 letter, AG had no actual knowledge that S & L actually purchased or sold any AG products whatsoever.**	**Hartlieb Dep. 126:12-130:6**
Australian Gold was aware of the fact that, at a minimum, the Products were being offered for sale at that time, as evidenced by the January 15, 2004 letter and the letter in response from counsel for S & L admitting as much. Further, S & L admitted to purchasing the Products from Yucatan and putting them on the internet since at least "late 2003, early	Mercadante Dep. 92:3-18.

'04."	
18. **S & L responded in a letter dated January 27, 2004, representing that all S & L's purchases of AG Products were made from retailers, not distributors.**	**2nd Am. Ans. & Counterclaims at ¶ 25 of Amended Answer**
The January 27, 2005 letter is a document that speaks for itself.	
19. **There is no evidence that at the time of the January 15, 2004 letter, S & L was purchasing AG Products from any party other than a retail salon.**	***No evidence***
Australian Gold objects to this statement of fact because S & L has not cited to any admissible evidence to support this statement. Every statement must be "followed by citation to evidence which would be admissible." *See* Local Rule 56.1(d). The statements must be "factual assertions . . . [and] should not contain conclusions." *U.S. Information Sys.*, 2006 U.S. Dist. LEXIS 52870.[2] Further, Australian Gold disputes this statement of fact. Leslie Hartlieb testified that it had a reasonable belief that S & L was obtaining the Products through a distributor because S & L had every single Product for sale on the website and tanning salons do not carry every single Product. Thus, the orders made by S & L had to be with a distributor. *See also* Responses to Statement of Material Fact Nos. 10 and 24.	Hartlieb Dep. 118:9-119:13.
20. **There is no evidence that at the time before or since January 15, 2004 S & L or its principals or any person associated with them purchased AG Products from a Distributor.**	**AG's Responses to Interrogatories # 8.**
Australian Gold disputes this statement of fact because S & L Vitamins used authorized tanning salons as conduits to purchase Products and circumvent Australian Gold's distribution system. *See also* Responses to Statement of Fact Nos. 10	Mercadante Dep. 102:16-106:4; 111:19-113:7; 154:22-156-18; 157:4-158:2

[2] Throughout its Statement of Facts, S & L cites to "No Evidence" to support various statements. Australian Gold incorporates this objection into each such reference.

and 24.	
21. **There is no evidence that at any time have S & L or its principals or any person associated with them knowingly purchased AG Products from a Distributor.**	**AG's Responses to Interrogatories # 8.**
Australian Gold disputes this statement of fact because the Products were purchased from authorized distributors through "tanning salons" that acted as a conduit. *See also* Responses to Statement of Fact Nos. 10 and 24.	Mercadante Dep. 102:16-106:4; 111:19-113:7; 154:22-156-18; 157:4-158:2
22. **Prior to or around the time of the filing of this Action, investigation by AG as to whether any distributors were selling or had sold AG Products to S & L did not indicate that any had done so.**	**Hartlieb Dep. 130:7-132:2**
Australian Gold disputes this statement of fact because it misstates the cited testimony. Leslie Hartlieb's testimony in response to the question whether the investigation led to the identity of any distributor being implicated in sales to S & L was "I don't recall. Again, I wasn't personally involved in this."	Hartlieb Dep. 130:7-132:2
23. **Prior to the January 15, 2004 letter, S & L had no specific notice of AG's distribution system and the existence of the Distribution Agreements.**	**Hartlieb Dep. 104:12-106:1**
Australian Gold admits this statement of fact and notes that the purpose of the letter was to put S & L on notice. S & L admits that after it received the cease and desist letter it had knowledge that Australian Gold objected to the sale of the Products on the internet. S & L admitted that its knowledge of the Distributorship Agreements is why it continued to order from Yucatan.	Mercadante Dep. 116:20-24; 124:7-14; 124:21-125:18.
24. **There is no evidence that S & L operates or at any time relevant to this litigation did operate, own, control, manager or represent a tanning salon nor that AG ever had a factual basis for its claim that S & L did so.**	**Hartlieb Dep. 134:6-135:7, 138:4-7**
Australian Gold disputes this statement of fact. As	Mercadante Dep. 22:2-27:8; 102:16-

described in detail in response to paragraph 10 above, S & L used Yucatan, and other tanning salons, as conduits to obtain the Products and circumvent Australian Gold's distribution system. For example, S & L would call in its orders to Danny Sheehan, a principal of Yucatan, and request that Yucatan (Sheehan) place a telephone call to one of Australian Gold's authorized distributors to place S & L Vitamins' order. Yucatan then notified S & L when its order was delivered by the distributor to Yucatan's place of business. S & L would "take the whole box with us, invoice and all." S & L would then pay Yucatan for the invoice, plus a small premium. When Yucatan was sued by Australian Gold in this lawsuit, S & L loaned Yucatan and Mr. Sheehan, money for its legal bill. Yucatan repaid that loan by reducing the premium at which it sold the Products to S & L. S & L Vitamins conducted business with the other "tanning salons" from which S & L ordered the Products in substantially the same manner. Australian Gold maintains that S & L Vitamins obtained Australian Gold's lotion in this manner because it was aware of Australian Gold's Distributorship Agreements. First, S & L Vitamins was recently involved in litigation with another lotion manufacturer, California Tan, in which many of the same concerns, including the California Tan's distribution system, were at issue. Second, the only logical reason why S & L Vitamins would agree to pay Yucatan a premium over the price it paid to Australian Gold's distributors is that it knew that it was **prohibited** from ordering Australian Gold lotion directly from a distributor.	106:4; 111:19-113:7; 154:22-156-18; 157:4-158:2; Sagarin Dep. 83:21-84:12.
25. **AG has never identified any Distributor from which S & L has at any time purchased AG Products.**	**Hartlieb Dep. 165:1-168:8**
Australian Gold disputes this statement of fact. Using Yucatan and its other suppliers, S & L has obtained Products from its authorized distributors as evidenced by the invoices produced by Yucatan.	Sheehan Dep. 63:17-64:25, Ex. 3.

26. All of the Copyrighted Works set forth in AG's Seconded Amended Answer, Counterclaims and Amended Third Party Complaint ("Counterclaims") were federally registered no earlier than June, 2005.	**2nd Am. Ans. & Counterclaims, Exh. B**
Australian Gold admits that it created original and distinctive artwork for the labels of its tanning products and has obtained numerous federal copyright registrations therefore as follows: **Product / Title of Registration** — **Registration No.** Forever After — VA 1-309-535 Cheeky Brown — VA 1-309-533 Body Kisses — VA 1-309-530 Bearly Legal — VA 1-309-534 Unforgiven — VA 1-309-536 Sun Dreams — VA 1-309-531 Simply Divine — VA 1-309-529 Pink Diamond — VA 1-309-537 Free Spirit — VA 1-309-532 Australian Gold admits that the copyright registrations for all of these copyrights were effective June 13, 2005.	2nd Am. Ans. & Counterclaims, Exh. B
27. AG has identified no financial damages arising from the alleged use by S & L of any of the Copyrighted Works.	**Hartlieb Dep. 159:6-10**
Australian Gold denies this statement of fact. Its damages are in excess of $2,018,500.00.	Hartlieb Dep. 163:19-164:20; Hartlieb Aff. ¶ 9 and Ex. B thereto.
28. AG has suffered no quantifiable loss in sales by virtue of the alleged use of the Marks.	**AG's Responses to Interrogatories ## 3, 21**

Australian Gold objects to this statement of fact and S & L's reference to these interrogatories and answers. Interrogatory No. 3 asked Australian Gold to state the facts which show a likelihood of confusion. Interrogatory 21 asked Australian Gold to describe if it suffered "injury in its relations or prospective relations with distributors, as alleged in Paragraph 81 of defendant's counterclaim." Neither of the interrogatories asked about Australian Gold's sales.	S & L's Interrogatories Nos. 3, 21; see also Damages Worksheet
29. **There is no evidence of any consumer being confused by the use by S & L of any of the Marks.**	***No evidence***
S&L Vitamins' internet sales have resulted in customer complaints and have caused Australian Gold to lose sales and to incur additional promotional costs to protect the integrity and reputation of its customers. Further, it has caused actual confusion with respect to at least one customer who confused as to whether S & L was an authorized distributor.	Hartlieb Dep. 140:22-144:8; Ex. 5 thereto
30. **There is no evidence of likelihood of confusion or mistake or deception as to the affiliation, connection or association of AG and S & L or as to the origin, sponsorship or approval of the AG Products arising from S & L's use of any of the Marks.**	**Hartlieb Dep. 151:13-152:2; AG's Responses to Interrogatories # 3, 4**
Australian Gold disputes this statement of fact. S&L Vitamins' "BodySourceOnLine.Com" web site contains a number of links that direct the user to a listing of all products according to brand name, including links identified by Australian Gold's trademarks AUSTRALIAN GOLD, SWEDISH BEAUTY and CARIBBEAN GOLD. Each brand name link directs the users to a listing of the relevant products offered for sale by S&L Vitamins. In particular, the "Australian Gold," "Swedish Beauty" and "Caribbean Gold" links direct the user to a thumbnail product listing of Australian Gold's goods in its Australian Gold®, Swedish Beauty® and Caribbean Gold® product brands. S&L Vitamins' thumbnail product listings	Mercadante Dep. 175:23- 192:14 and Exs. 10-15 thereto; Sagarin Dep. 52:17-22, 101:13-103:11, 105:19-25, 106:5-107:14, 126:14-128:19, 129:19-131:11 and Ex. 1 thereto; Hartlieb Dep. Ex. 5.

identify Australian Gold's goods using Australian Gold's registered trademarks. Several of Australian Gold's trademarks corresponding to its Swedish Beauty® brand products are marked with either notice of registration using the "®" symbol, or notice of trademark using the symbol "TM." However, nowhere in S&L Vitamins' "BodySourceOnLine.Com" web site is Australian Gold identified as the owner of the trademarks and trademark registrations. Despite S&L Vitamins' use of notice of trademark registration on Australian Gold's Swedish Beauty® products, S&L Vitamins' "BodySourceOnLine.Com" web site fails to mark any of Australian Gold's other registered trademarks, including the trademarks AUSTRALIAN GOLD, SWEDISH BEAUTY and CARIBBEAN GOLD or any of registered trademarks used in connection with Australian Gold's Australian Gold® and Caribbean Gold® brand products. Each entry in S&L Vitamins' thumbnail listing of Australian Gold's products contains a further link to a specific product page that contains a brief description of the particular product, a larger image of the product, a comparison of the retail and discounted sales price of the product, and an "Add to cart" option that allows the user to purchase the product. The product descriptions on S&L Vitamins product pages are copied directly from Australian Gold's descriptions of its tanning products. Each specific product page contains a further link to a full-sized image of the relevant Australian Gold product. These full-sized images reproduce Australian Gold's copyrighted label artwork, and were intended to copy Australian Gold's own photographs of its products used on Australian Gold's web site "australiangold.com." Each full-sized image of Australian Gold's products is modified by the addition of S&L Vitamins' stylized "BodySourceOnline.Com" trade name and Body Source logo, which are positioned adjacent to	

or superimposed over the image of the product. In addition, the phrase "All Rights Reserved," appears directly beneath the image of the product. Despite the use of the phrase "All Rights Reserved," S&L Vitamins' "BodySourceOnLine.Com" web site does not provide any notice of Australian Gold's copyrights. These facts raise factual questions as to the likelihood of confusion. S&L Vitamins promotes its sales of Australian Gold products by paying for placement advertising in the Internet search engines Yahoo and Google with respect to the terms "Australian Gold" and "Swedish Beauty" For example, because of such advertising, when the Yahoo search engine is used to search for the term "australian gold" on the Internet, S&L Vitamins' "thesupplenet.com" web site appears as high as fifth in a list of sponsored web sites. In addition to placement advertising, S&L Vitamins' "BodySourceOnLine.Com" web site contains HTML source code that incorporates various metatags, including the trademarks AUSTRALIAN GOLD, SWEDISH BEAUTY and CARIBBEAN GOLD. The use of metatags corresponding to Australian Gold's trademarks increases the prominence of S&L Vitamins' "BodySourceOnLine.Com" web site in the listing of results of Internet searches -- e.g. Yahoo or Google searches -- when Australian Gold's trademarks are used as the search terms. S & Ls' advertisement of Australian Gold's products on its "BodySourceOnLine.Com" web site and its labeling of Australian Gold's products has caused customer confusion as to whether S&L is the source or an authorized dealer of Australian Gold's Products.	
31. **There is no evidence as to the distinctiveness or fame of the Marks.**	***No evidence***
Australian Gold disputes this statement of fact. Australian Gold's Products are sold to the majority of the over 25,000 tanning salons in the United	2nd Am. Ans. & Counterclaims at ¶¶ 2, 14, of Counterclaims

States. Australian Gold manufactures approximately 80 different lotions. *See also* Response to Statement of Fact No. 33.	
32. **There is no evidence of AG's advertising expenditures for any of the Marks.**	***No evidence***
Australian Gold disputes this statement of fact. Australian Gold spends in excess of $500,000.00 each year in advertising.	Hartlieb Aff. ¶ 7.
33. **There is no evidence of the selling power of any of the Marks.**	***No evidence***
Australian Gold disputes this statement of fact. S & L admitted that the Products were among its best sellers. Australian Gold brand Products were S & L's top seller and comprised approximately 25% of its lotion sales. Swedish Beauty comprised another 5 to 10%. If S & L did not sell the Products it would have to "redirect, refocus" its business. One of S & L 's suppliers testified that Australian Gold is its best seller, and that Swedish Beauty and California Tan (a competing line of tanning lotions) rank "about level" below Australian Gold.	Mercadante Dep. 195:10 - 196:7, 197:15-21; Sagarin Dep. 71:21-22; 20:7-17. REDACTED
34. **There is no evidence that the use of the Marks by S & L caused blurring, i.e., the weakening of any of the Marks through their identification with dissimilar goods.**	***No evidence***
Australian Gold disputes this statement of fact. *See* Response to Statement of Fact No. 35.	
35. **There is no evidence that the use of the Marks by S & L caused tarnishment, i.e., the casting of any of the Marks in an unflattering light.**	***No evidence***
The Products are sold as premium products sold only in professional tanning salons. Their sale over the internet tarnishes them because they can be perceived as "flea market quality products." Sales on the internet directly affect a products reputation, similar to what would happen to a Rolls Royce if one could purchase it at K-Mart.	Hartlieb Dep. 121:11-122:5; Hartlieb Aff. ¶ 6.

36. There is no evidence that the conduct of S & L has interfered with the relationships or prospective relationships between AG and any specific Distributor.	***No evidence***
Australian Gold disputes this unsupported conclusion. One of Australian Gold's keys to a successful distribution strategy is securing quality distributors. Australian Gold has promised its distributors and tanning salons to combat internet diversion. If the Products ares sold in unintended markets, it affects Australian Gold's relationships with its distributors.	Australian Gold's Response to Interrogatory No. 21; AG-0004972-74;
37. There is no evidence that the conduct of S & L has interfered with the relationships or prospective relationships between AG and any specific Distributor in any financially quantifiable manner.	***No evidence***
Australian Gold denies this statement of fact. Yucatan was Premiere Salon, which meant that it received cash back incentives directly from Australian Gold for Products purchased and sold in its salon. Australian Gold has paid Yucatan over $14,000 in cash back incentives, which include incentives on unauthorized sales to S & L. Australian Gold also paid Yucatan $7,105.77 in co-op advertising. Further, Australian Gold has been required to offer special financial programs to salons who have complained about the sale of its Products on the internet. Also, Australian Gold has spent in excess of $1.5 million in training on its Products and their proper use, which sales on the internet undermines. Australian Gold's damages are in excess of $2 million.	Sheehan Dep. 21:4-23; Hartlieb Dep. 140:15-148:1; Interrogatory Resp. No. 3; Damages Worksheet, attached to Hartlieb Aff. as Ex. B; Salon Co-Op Claim Form (produced in supplemental production on April 25, 2006).
38. There is no evidence that the conduct of S & L has affected the relationships or prospective relationships between AG and any Distributor in such manner as to cause damage	***No evidence***

to AG in any financially quantifiable manner.	
See Australian Gold's Response to Statement of Fact No. 37.	Sheehan Dep. 21:4-23; Hartlieb Dep. 140:15-148:1; Interrogatory Resp. No. 3; Damages Worksheet, attached to Hartlieb Aff. as Ex. B; Salon Co-Op Claim Form (produced in supplemental production on April 25, 2006).
39. **There is no evidence that S & L has conspired with a Distributor or any other person to illegally obtain AG Products.**	***No evidence***
Australian Gold denies this statement of fact. *See* Responses to Statement of Facts Nos. 10 and 24.	
40. **There is no evidence that S & L has conspired with a Distributor or any other person to sell AG Products on the Internet.**	***No evidence***
Australian Gold denies this statement of fact. *See* Responses to Statement of Facts Nos. 10 and 24.	
41. **There is no evidence that the perceived value of AG Products has remained high and sales have continued to increase as a direct result of the actions of AG alleged in ¶¶ 26 and 27 .**	***No evidence***
Leslie Hartlieb testified that in 1997 Australian Gold changed its distribution system to sales to only professional tanning salons and as a result it has improved its reputation and thus overall sales with tanning salons. The tanning salons know that they are "selling a product that is designed for tanning salons, sold through the distributor channel and sold to them to provide to their customers." This business model has enhanced Australian Gold's integrity with the tanning salons. From December, 1996 to the present, Australian Gold's sales have increased 73.6%.	Hartlieb Dep. 87:19-88:21; Hartlieb Aff. ¶ 5.
42. **There is no evidence that the reputation of the AG Products has been enhanced because they are only allegedly available to consumers in tanning salons and not in discount outlets such as flea markets, beauty stores and the Internet as a direct result of the actions of AG as alleged in ¶¶**	***No evidence***

26 and 27.	
The Products are sold as premium products and sold only in professional tanning salons. Their sale over the internet tarnishes them because they are then perceived as "flea market quality products." Sales on the internet directly affect a products reputation, similar to what would happen to a Rolls Royce if one could purchase it at K-Mart. *See also* Response to Statement of Fact No. 41.	Hartlieb Dep. 87:19-88:21; 121:11-122:5; Hartlieb Aff. ¶ 6.
43. **There is no evidence that AG Products are only available to consumers in tanning salons and not in discount outlets such as flea markets, beauty stores and the Internet.**	***No evidence***
Australian Gold takes numerous steps to ensure that its tanning products are sold to the public only through authorized tanning salons, where consumers can receive proper instruction and training on the use of the Products. Australian Gold routinely performs "store checks" to ensure that its products are being sold to businesses operating as tanning salons as defined in its Distributorship Agreement. Furthermore, Australian Gold does not authorize the sale of its Products through the Internet. Australian Gold's Distributorship Agreement with its distributors further prohibits the sale of Australian Gold's Products "to any person or entity which markets, distributes or sells Products on the Internet."	Hartlieb Dep. 40:11-18, 57:1-16, 87:5-22
44. **AG Products are sold on the Internet by others besides S & L.**	**Mercadante Dep. 108:15-109:14; 110:8-111:18; Sagarin Dep. 56:10-17; Hartlieb Dep. 40:14-41:41**
Australian Gold admits this statement but adds for purposes of clarification that it does not authorize or approve of the sale of its Products on the internet.	Hartlieb Dep. 40:14-18; Distributorship Agreement Art. 1.1.
45. **Retail tanning salons that buy AG Products do not enter into agreements prohibiting them from selling AG Products to any person or business.**	**Hartlieb Dep. 54:14-55:3; 106:8-107:15**

Australian Gold disputes this statement of fact. Australian Gold does enter into contracts with retail tanning salons, including chain salons, whose contracts contain the same prohibitions against selling the Products as the Distributorship Agreement and Premier Salon Agreements with retail tanning salons that sell exclusively Australian Gold Products. The Premier Salon Agreements prohibit salons from selling to customers for resale on the internet because the agreements limit the sale of Products to customers in their salons.	Hartlieb Dep. 50:22-56-51:9; 169:6-170:21.
46. **There is no evidence that S & L was, at the time of the filing of the Answer, aware of any agreements between AG and any of its retail suppliers that limited sales of AG Products by those retail suppliers to any person or business.**	***No evidence***
For the reasons set forth *supra*, Australian Gold objects to the form of this statement of fact. If such a statement is true then it must be supported by admissible evidence, such as an affidavit from the corporate representative of S & L attesting to this fact.	
47. **Yucatan, Inc., whose owner is Danny Sheehan, is alleged to be an AG "Premier Salon" which was entitled to special rebate and cash back programs based on the volume of AG Products it sells through its tanning salon to tanning salon customers, in consideration for which the Premier Salon agrees to sell AG Products exclusively. Premier Salons also agree not to sell AG Products to any person who will resell them on the Internet.**	**Defendant's Third Party Complaint ("Third Party Complaint") ¶¶ 22-26**
Australian Gold admits this statement of fact.	
48. **There is no evidence of any agreement between AG and Yucatan, Inc. or Danny Sheehan that limited sales by those retail suppliers to any person or business that was executed by Yucatan, Inc. or Danny Sheehan.**	***No evidence***
Australian Gold disputes this statement of fact. Yucatan Tanning entered into a Premier Salon agreement with its distributor, Future Industries, Inc.	Sheehan Dep. Ex. 1; email from Future Industries to Australian Gold dated April 14, 2006 (produced in supplemental

and which was approved by Australian Gold. Danny Sheehan's name is identified as one of the owners of Yucatan and he approved the contract.	document production on April 25, 2006).
49. **There is no evidence that S & L was, at the time of the filing of the Answer, aware of any alleged agreement between AG and Yucatan, Inc. and Danny Sheehan that limited sales by those retail suppliers to any person or business.**	*No evidence*
For the reasons set forth *supra*, Australian Gold objects to the form of this statement of fact. If such a statement is true then it must be supported by admissible evidence, such as an affidavit from the corporate representative of S & L attesting to this fact.	
50. **There is no evidence that S & L was aware of any alleged agreement between AG and Yucatan, Inc. and Danny Sheehan that limited sales by those retail suppliers to any person or business until after such time as Yucatan, Inc. and Danny Sheehan earlier than April 26, 2006.**	*No evidence*
For the reasons set forth *supra*, Australian Gold objects to the form of this statement of fact. If such a statement is true then it must be supported by admissible evidence, such as an affidavit from the corporate representative of S & L attesting to this fact.	
51. **There is no evidence that S & L induced Yucatan, Inc. or Danny Sheehan to breach any contract between either of them and AG.**	*No evidence*
Australian Gold objects to this statement of fact as being immaterial. The conduct of S & L using Yucatan and others as a conduit to do indirectly what it could not do directly gives rise to Australian Gold's claim for tortious interference. *See also* Australian Gold's Responses to Statement of Facts Nos. 10 and 24.	
52. **There is no evidence that AG put S & L on notice of the identity of any Premier Salon prior to its disclosure in this litigation that Yucatan,**	*No evidence*

Inc. was or is a Premier Salon.	
Australian Gold objects to this statement of fact as being immaterial. The conduct of S & L using Yucatan and others as a conduit to do indirectly what it could not do directly gives rise to Australian Gold's claim for tortious interference. *See also* Australian Gold's Responses to Statement of Facts Nos. 10 and 24.	
53. **There is no evidence that AG put S & L on notice of the identity of any Premier Salon besides its allegation that Yucatan, Inc. was or is a Premier Salon.**	***No evidence***
Australian Gold objects to this statement of fact as being immaterial. The conduct of S & L using Yucatan and others as a conduit to do indirectly what it could not do directly gives rise to Australian Gold's claim for tortious interference. *See also* Australian Gold's Responses to Statement of Facts Nos. 10 and 24.	
54. **Yucatan's Distributor never explained to Yucatan that there were any restrictions on whom AG Products could be sold to by Yucatan.**	**Sheehan Dep. 33:19-22**
Australian Gold objects to this statement of fact as being immaterial. The conduct of S & L using Yucatan and others as a conduit to do indirectly what it could not do directly gives rise to Australian Gold's claim for tortious interference. *See also* Australian Gold's Responses to Statement of Facts Nos. 10 and 24.	
55. **Yucatan was a significant source of AG Products for S & L.**	**Sheehan Dep. 39:3-40:14; 41:20-44:18**
Australian Gold admits this statement of fact.	
56. **Yucatan never attended regional training meetings or knew of them.**	**Sheehan Dep. 26:10-18**
Australian Gold admits this statement of fact.	
57. **Yucatan, Inc. never received the AG training**	**Sheehan Dep. 26:7-9**

materials.	
Australian Gold disputes this statement of fact. Sheehan testified that he personally was not aware if Yucatan received the training materials. He further acknowledged that "a lot of times I don't see all the stuff because the girls will open a lot of it and take it for themselves." Further, whether Yucatan actually received training materials is immaterial because Australian Gold provides its distributors with training materials to provide to tanning salons, which they are obligated to do.	Sheehan Dep. 25:24-26:1; Distributorship Agreement Art. 1.6.
58. **Two AG employees have training responsibility for its worldwide sales.**	**Hartlieb Dep. 163:7-164:5**
Australian Gold disputes this statement of fact. While it has two full-time trainers, Australian Gold's sales staff of 8 trains its distributors and the tanning salons on the proper use of the Products.	Hartlieb Dep. 163:7-164:5
59. **S & L never communicated to Danny Sheehan that it was purchasing AG Products from Distributors and never made any effort to hide its sources of AG Products from Danny Sheehan.**	**Sheehan Dep. 61:18-63:10; 69:8-70:12**
Australian Gold admits this statement of fact.	
60. **The purpose of SPF's in tanning products is to protect users from harmful ultraviolet rays during tanning.**	**Hartlieb Dep. 21:8-12□**
Australian Gold admits this statement of fact.	
61. **AG sells tanning products to the general public that are for outdoor use and which do not contain any Sunscreen Protection Factor ("SPF").**	**Hartlieb Dep. 119:12-21**
Australian Gold admits that it sells outdoor lotions with and without SPF.	
62. **AG has no policy restricting the age of persons who may purchase AG Products.**	**Hartlieb Dep. 25:13-17:24**
Australian Gold admits this statement of fact.	

63. AG does not employ a person on its staff of over 80 people with full time responsibility for product or customer safety.	**Hartlieb Dep. 36:16-38:12**
Australian Gold disputes this statement of fact. Leslie Hartlieb, the President and CEO of Australian Gold, testified that she is the main person at Australian Gold with responsibility over safety issues. Australian Gold also employs persons who monitor the quality of the manufacturing of the Products and a chemist to assist with the formulas of the Products.	Hartlieb Dep. 37:8-38:12.
64. AG sells AG Products to persons that are not and do not operate tanning salons but own their own tanning beds at the time they establish their accounts with AG.	**Hartlieb Dep. 55:25-56:24**
Australian Gold admits this statement of fact with the clarification that it sells Products to those individuals who have purchased a tanning bed from ETS, Inc. (a sister company) for their personal use and Australian Gold requires the consumer to verify that he/she owns a tanning bed by providing confirming information such as a serial number. With respect to entities claiming to be tanning salons, Australian Gold monitors the salons to ensure that they are operating a tanning salon, including conducting "salon checks" to make sure the salon is legitimate.	Hartlieb Dep. 55:25-56:20; 56:26-57:16.
65. The AG contract with its Distributors only requires that training with respect to the use of AG Products be available, not that end consumers are actually trained.	**Hartlieb Dep. 60:5-61:22**
The Distributorship Agreement speaks for itself. The Distributorship Agreement requires Distributors to (1) assist Australian Gold with training on the use and benefits of the Products; (2) make its sales staff available on a quarterly basis for training and requires Distributors to make its staff attend 2 training programs each year; and (3) host its own training program for its salon customers.	

66. **AG does not examine, test or monitor Distributors to determine if they are adequately trained to advise consumers regarding the use of AG Products.**	**Hartlieb Dep. 62:5-63:9**
Australian Gold disputes this statement of fact because it is misleading and taken out of context. While Australian Gold does not require an official "test," it does have many procedures to ensure that its distributors are properly trained. Australian Gold provides its distributors with training materials to provide to tanning salons. The Distributorship Agreement requires Distributors to (1) assist Australian Gold with training on the use and benefits of the Products; (2) make its sales staff available on a quarterly basis for training and requires Distributors to make its staff attend 2 training programs each year; and (3) host its own training program for its salon customers.	Hartlieb Dep. 62:5-63:9; Distributorship Agreement Art. 1.6; Training Materials AG0004421-0005129.
67. **Consumers who make inquiries directly to AG regarding the use of AG Products are routed to AG's sales department.**	**Hartlieb Dep. 65:24-66:18**
Australian Gold admits that telephone calls to the 800 number on the bottles of Product are routed to the sales department.	Hartlieb Dep. 65:24-66:18
68. **Although AG has a goal that all retail tanning salons that buy AG Product from Distributors receive AG's information brochures about its products, it does not know that they do nor have any way of insuring that they do, and some retail tanning salons do not receive these brochures.**	**Hartlieb Dep. 66:23-67:18**
While Australian Gold cannot ensure that each of the thousand of tanning salons receives a copy of training manuals, it is Australian Gold's goal that they do and every distributor is provided with the training manuals.	Hartlieb Dep. 66:23-67:18
69. **AG training manuals do not have a section that deals exclusively with the safety of AG Products.**	**Hartlieb Dep. 72:4-25**
Australian Gold admits that its training manuals do not have, for example, a section entitled "Safety,"	Australian Gold Training Manual 2004,

but disputes that its manuals do not address safety. Exhibit 3 to the Deposition of Leslie Hartlieb is the 2004 Australian Gold Training Manual. The manual has detailed information about each of the Products and their uses and benefits (See *Power of Choice Chart* Bates No. AG0004510-11; Product Descriptions for each Product, Bates No. AG0004514-51) and a comprehensive glossary of ingredients used in the Products (Bates No. AG0004559-67). The *Power of Choice* chart identifies which Products contain "tingle" which can cause an adverse reaction if improperly used or used by someone with the wrong skin type. The individual Product information sheets provide the warning "for advanced tingle tanners" on certain Products.	Hartlieb Dep. Ex. 3. Hartlieb Dep. Ex. 3 at AG0004510; Hartlieb Dep. 74:11-75:18. Hartlieb Dep. 82:5-15, Dep. Ex. 3 at AG0004532.
70. **AG has no way of knowing how retail salons actually interact with customers and if they offer or provide any safety information or training whatsoever.**	**Hartlieb Dep. 155:7-156:19**
Australian Gold objects to this statement of fact because it mischaracterizes the cited testimony. Leslie Hartlieb testified that it is Australian Gold's goal to "train the employees [of the tanning salons] to provide the best education and information on the products to the salon customer." She further testified that there are " a lot of salons that we go to regularly."	Hartlieb Dep. 155:7-156:19
71. **Among the AG Products are "Tingle Products" that contain the chemicals Benzyl Nicotinate or Methyl Nicotinate that increase circulation under the skin.**	**Hartlieb Dep. 70:7-71:2**
Australian Gold admits this statement of fact.	
72. **AG does not maintain a centralized record of safety practices of tanning salons.**	**Hartlieb Dep. 168:14-169:1**
Australian Gold admits this statement of fact.	

73. **Tingle products can cause a reaction in some users, but cannot cause users to get hurt.**	**Hartlieb Dep. 73:1-9**
The improper use of a Tingle Product can cause physical harm to consumers. In fact, Australian Gold has been sued by persons who have improperly used the Product. In addition, it has been the subject of letters and complaints made to Australian Gold and the FDA over improper use of the Product. For example, one consumer complained that the use of a Tingle Product was the "most horrible experience in my life. I felt like I was stung by 10,000 bees and lit on fire." Other consumers complained about similar reactions to the FDA. Moreover, consumers who do not have the correct skin type or base tan to use a Tingle Product are "not going to come back tomorrow" because of the bad experience. The reaction will make a consumer "want to rip your skin off," according to one of S & L's suppliers. For consumers that buy a Tingle Product over the internet there is no safeguard to ensure that they receive the correct Product or the proper training and instruction on its use.	Hartlieb Dep. 75:19-22; Hartlieb Aff. ¶ 8 and Ex. A thereto; Dep. 61:4-18; 62:8-16. REDACTED
74. **Some retail salons that buy from AG Distributors do not receive adequate training.**	**Hartlieb Dep. 76:7-20**
Australian Gold objects to this statement of fact because the testimony cited does not stand for the proposition set forth.	
75. **Only one consumer has ever sued AG in connection with a reaction from a Tingle Product.**	**Hartlieb Dep. 77:17-20**
Australian Gold admits this statement of fact and adds that it has received several complaints about Tingle Products because of the consumers' improper use.	Hartlieb Dep. 75:19-22; Hartlieb Aff. ¶ 8 and Ex. A thereto.
76. **The Food and Drug Administration ("FDA") does not regulate Tingle Products as an over-the-counter drug.**	**Hartlieb Dep. 77:21-78:3**

Australian Gold admits this statement of fact.	
77. **Safety information about the use of Tingle Products in AG product manuals is designated as "selling tips".**	**Hartlieb Dep. 78:24-82:15**
Australian Gold admits this statement of fact with the clarification that the Australian Gold Training Manual – 2004 sets forth safety information about its Products on individual Product information sheets, including in a section titled "selling tips."	
78. **AG does not offer, as part of its training, a safety training class.**	**Hartlieb Dep. 84:8-22**
Australian Gold admits that it does not offer a separate "safety training class," but disputes that it does not offer training on the safety of the Products. *See* Response to Statement of Fact No. 69. Further, the tanning industry has independent companies that train retail salons on safety issues related to all manufacturers' products. In fact, at least two of S & L's suppliers received such training from Smart Tan, an industry tanning firm.	Sagarin Dep. 36:17-23; Dep. 56:16-23. REDACTED
79. **AG does not consult with medical experts in connection with Tingle Products or other safety issues.**	**Hartlieb Dep. 154:10-20**
Australian Gold objects to this statement of fact because it misstates the testimony cited. The question was whether on an "ongoing basis" does Australian Gold consult with a "medical expert."	
80. **The Indoor Tanning Association ("ITA") is the main trade association in the indoor tanning industry, and AG is a member of the ITA, contributes to it financially and participates in its board.**	**Hartlieb Dep. 152:5-153:4; 153:15-17**
Australian Gold admits this statement of fact.	

81. **The ITA does not have any initiatives or other activities by which it educates the public in terms of the risks or dangers associated with Tingle Products.**	**Hartlieb Dep. 153:5-13**
Australian Gold objects to this statement of fact as being immaterial as to the practices of Australian Gold. The actions of the ITA cannot be imputed to Australian Gold. Further, the deponent did not state that ITA did not have any initiatives, but stated that she was not aware of any.	Hartlieb Dep. 153:5-13
82. **AG cannot quantify its financial losses or even the general range of its financial losses as a result of the activities of S & L.**	**Hartlieb Dep. 138:8-145:22**
Australian Gold denies this statement of fact. Australian Gold's damages are set forth in its Damages Worksheet.	Hartlieb Aff. ¶ 9 and Ex. B thereto.
83. **AG threatened to use litigation to "discovery [sic] the scope of" S & L's business, and intended to carry out that threat.**	**Hartlieb Dep. 119:24-126:11**
Australian Gold objects to this statement of fact because it is taken out of context. That statement was made in a letter sent by Australian Gold to S & L demanding it stop selling the Products on the internet. Based upon the fact that S & L offered every Product for sale on its website, Australian Gold believed that was purchasing from a distributor, directly or indirectly, and thus was protecting its legal rights by demanding that S & L cease from interfering with its business model.	Hartlieb Dep. Ex. 11
84. **There is no evidence of the use of "false pretenses" by S & L as alleged in ¶ 74 of AG's counterclaim.**	**AG's Responses to Interrogatories # 18.**
Australian Gold stated in response to the interrogatory (which was served prior to conducting depositions) it "suspects that S & L Vitamins is using a straw man, false names or other covert means to obtain the products." S & L and its major supplier, Yucatan Tanning, have since confirmed in deposition testimony that	AG's Responses to Interrogatories # 18.

Yucatan was the "straw man" and served as the conduit between S & L and Australian Gold's distributors to purchase the Products. *See* Responses to Statement of Facts Nos. 10 and 24.	
85. AG's allegation in ¶ 96 of its counterclaim that S & L's website is "misleading in material aspects" is limited to S & L's use of the name of its website in photographs of AG products.	**AG's Responses to Interrogatories # 19**
Australian Gold stated that "S & L Vitamins' use of photographs of the products with its own name superimposed over the photographs impermissibly suggests a sponsorship, affiliation, endorsement or association between Australian Gold and Plaintiffs."	AG's Responses to Interrogatories # 19 (referring in part to response to Interrogatory Response # 15).
86. There is no evidence of AG's income and profits from the sale of AG products in connection with the use of the Marks.	**AG's Responses to Interrogatories # 20**
Australian Gold objects to this statement of fact because it misstates the testimony cited. Australian Gold objected to the interrogatory because it sought the amount of Australian Gold's sales and profits for the last ten (10) years. Australian Gold objected because it was overly broad. Further, its damages are set forth in its Damages Worksheet.	Hartlieb Aff. ¶ 9 and Ex. B thereto.
87. All photographs of AG products used by S & L were taken by Helen Sagarin Dep. or Elizabeth Sagarin	**Sagarin Dep. 51:14-52:7, 147:25-148-4**
Australian Gold disputes this statement of fact. S&L's website as of April 19, 2004 contained photographs of the Products which appear to be copies of Australian Gold's photographs. Australian Gold believes that based upon a review of the website on or around that date, which these photographs were taken from Australian Gold. For example the photograph of the Product "Blazin" (AG0000015) appears to the have "New" banner across the Product, which is the same as the photograph Australian Gold used. The SPF 8, 15 and 30 Products are all displayed in the one photograph; the same manner in which Australian Gold photographed the Products that year.	Mercadante Dep. 165:11-166:8; Ex. 7 thereto.

However, S & L does not have copies of the photographs which it displayed on the website at that time because it has since deleted them. S & L admits that it has taken photographs of Products directly from other tanning lotion manufacturer's websites but denies doing so with Australian Gold.	
88. **No photographs of AG products used by S & L were taken from the AG website.**	**Sagarin Dep. 52:5-53:13, 54:20-24**
See Response to Statement of Fact No. 87.	
89. **There is no evidence that S & L has intentionally induced any Distributor to breach the Distribution Agreements by ordering AG Products from "John Doe" distributors and then selling AG Products over the Internet to the general public.**	***No evidence***
See Responses to Statement of Fact Nos. 10 and 24.	
90. **There is no evidence that S & L has intentionally induced any Distributor to breach the Distribution Agreements in any manner.**	***No evidence***
See Responses to Statement of Fact Nos. 10 and 24.	
91. **There is no evidence of AG's exclusive distribution agreement with its European Distributor.**	***No evidence***
Australian Gold disputes this statement of fact. The Distributorship Agreement was produced in discovery.	AG0006006-0006016
92. **There is no evidence that S & L has interfered with AG's exclusive distributorship relationship with AG's European Distributor.**	***No evidence***
Australian Gold disputes this statement of fact. S & L admits that it sold the Products to a customer in Europe, who coincidentally did business as Body Source (one of S & L's assumed business names) in the UK. This conduct interfered with Australian	Mercadante Dep. 210:12-218:25 and Ex. 19 thereto; AG0006006-0006016.

Gold's distributor's exclusive right to sell into this market.	
93. **There is no evidence that AG has been damaged by any interference by S & L with any contract between AG and any Distributor.**	***No evidence***
Australian Gold disputes this statement of fact. Australian Gold's damages are set forth in its Damages Worksheet.	Hartlieb Aff. ¶ 9 and Ex. B thereto.
94. **There is no evidence that AG has been damaged by any interference by S & L with any prospective business relationship or economic advantage involving AG and any Distributor.**	***No evidence***
Australian Gold disputes this statement of fact. Australian Gold's damages are set forth in its Damages Worksheet.	Hartlieb Aff. ¶ 9 and Ex. B thereto.

Dated: New York, New York
September 28, 2006

Respectfully submitted,

By: [signature]

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Attorneys for Australian Gold, Inc.

Hartlieb Affidavit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

S & L VITAMINS, INC., Plaintiff/Counterclaim Defendant, - vs. – AUSTRALIAN GOLD, INC., Defendant/Counterclaim Plaintiff.	CIVIL ACTION NO. 05-CV-1217 (JS) (MLO) **AFFIDAVIT OF LESLIE HARTLIEB**
AUSTRALIAN GOLD, INC., Third Party Plaintiff, - vs. – LARRY SAGARIN AND JOHN DOES 1-10, Third Party Defendants.	

I, Leslie Hartlieb, under penalties of perjury hereby testify to the following:

1. I have personal knowledge of the statements contained herein.

2. I am over 18 years of age and competent to testify.

3. I am the President and Chief Executive Officer of Australian Gold, Inc. ("Australian Gold").

4. In 1997, Australian Gold changed its distribution system and authorized sales only to professional tanning salons where the consumer was to receive training and instruction on the proper use of the Products.

5. From December, 1996 to the present, Australian Gold's sales have increased by 73.6 %.

6. The value of the Products to the consumer has remained high and Australian Gold Products are considered premium tanning lotions and skin care products in the industry. Keeping the Products out of retail stores, flea markets and the internet has caused consumers to view the Products as premium products.

7. On an annual basis, Australian Gold expends in excess of $500,000.00 in advertising its Products. This amount does not include the cost of training its distributors and tanning salons.

8. Australian Gold has received complaints from consumers who have experienced adverse reactions after they have used Australian Gold's "tingle" Products. These reactions include letters to the FDA. True and correct copies of the letters which Australian Gold has received are attached hereto as *Exhibit A.*

9. The Damages Worksheet, attached hereto as *Exhibit B*, is a document Australian Gold prepared that sets forth Australian Gold's damages in this lawsuit.

10. I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2006.

[signature]
Leslie Hartlieb President

STATE OF INDIANA)
) SS:
COUNTY OF Marion)

Subscribed and sworn to before me a Notary Public in and for the said County and State, this 27th day of September, 2006.

[signature] Melissa Hostetler
Notary Public

Notary Public, Marion Co., IN
My Comm. Expires Aug. 27, 2010

MELISSA HOSTETLER NOTARY PUBLIC SEAL EXPIRES 08-27-2010 STATE OF INDIANA

Melissa Hostetlar
Printed

County of Residence: Marion

My Commission Expires: Notary Public, Marion Co., IN My Comm. Expires Aug. 27, 2010

I/1830714.1

EXHIBIT A

Brenda Horner

From: Leslie Hartlieb
Sent: Wednesday, July 13, 2005 2:55 PM
To: 'matheushgl-adv@yahoo.com.br'
Subject: RE: FW: allergy

Thanks you for the information. I will investigate further. To date we have not had any complaints on Blazin, but I will review the batch data in order to get a better grasp of this particular situation.

Leslie

-----Original Message-----
From: Matheus H. G. Lourenço [mailto:matheushgl-adv@yahoo.com.br]
Sent: Wednesday, July 13, 2005 1:54 PM
To: Leslie Hartlieb
Subject: Re: FW: allergy

Dear Leslie,
There are some numbers and letters, almost on the bottom, on the back side of the bottle: "MS26079AT". It´s probably the batch number, you asked me.
About the product, is "Australian Gold Blazin´ with Tingle Bronzing Hemp", and it was purchased in Peoria, Illinois, USA.
Thank you,
Matheus

Leslie Hartlieb <Leslie@etstan.com> escreveu:

> Dear Matheus,
> Thank you for the information, I am sorry that your client has had a bad experience. Please let me know what product you are referring to and if possible the batch number on the bottle too. It should be a 5 digit code ink jet on the bottom of the bottle. Has she tried to return the product to the salon where it was purchased? Would you please provide the salon name also?
> Thank you
> Leslie Hartlieb
> President Australian Gold
> ------Original Message-----
> From: Australian.Gold@www.etstan.com
> [mailto:Australian.Gold@www.etstan.com]
> Sent: Thursday, June 16, 2005 3:06 PM
> To: Info Agi
> Subject: allergy
>
> Dept: Australian Gold
> State/Country: AK
>
> Customer Info:
> Name: Matheus Lourenço
> Email: matheushgl-adv@yahoo.com.br

Phone: +55 19 8131 5699
Contact by: E-Mail

------- BEGIN MESSAGE -------

For whom it may concerns,

I am a lawyer, and my client had some problems with a product of your company.
For now, I can say that it all ended up in a hospital.
Because I was contacted with the aim of suiting your company, and because of the fact that nobody would like to start a law suit. I am trying to contact you before, for probably saving some time, and also efforts, from both of the parts involved.
If you could contact me, I would give more informations about the facts that occurred.
Best Regards,
Matheus Lourenço
Brazil

------- END MESSAGE -------

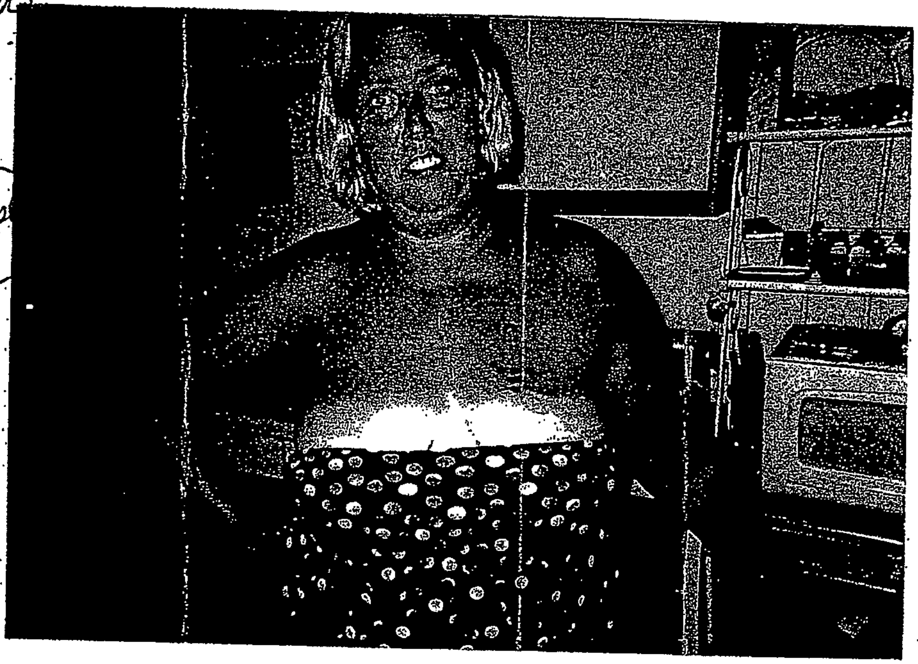
Converse com seus amigos em tempo real com o Yahoo! Messenger
http://br.download.yahoo.com/messenger/

Margaret Augustyniak
3127 Tarwater #12
Anchorage, AK 99508
907-677-9514

Also enclosed are copies of labels from the Bottle.

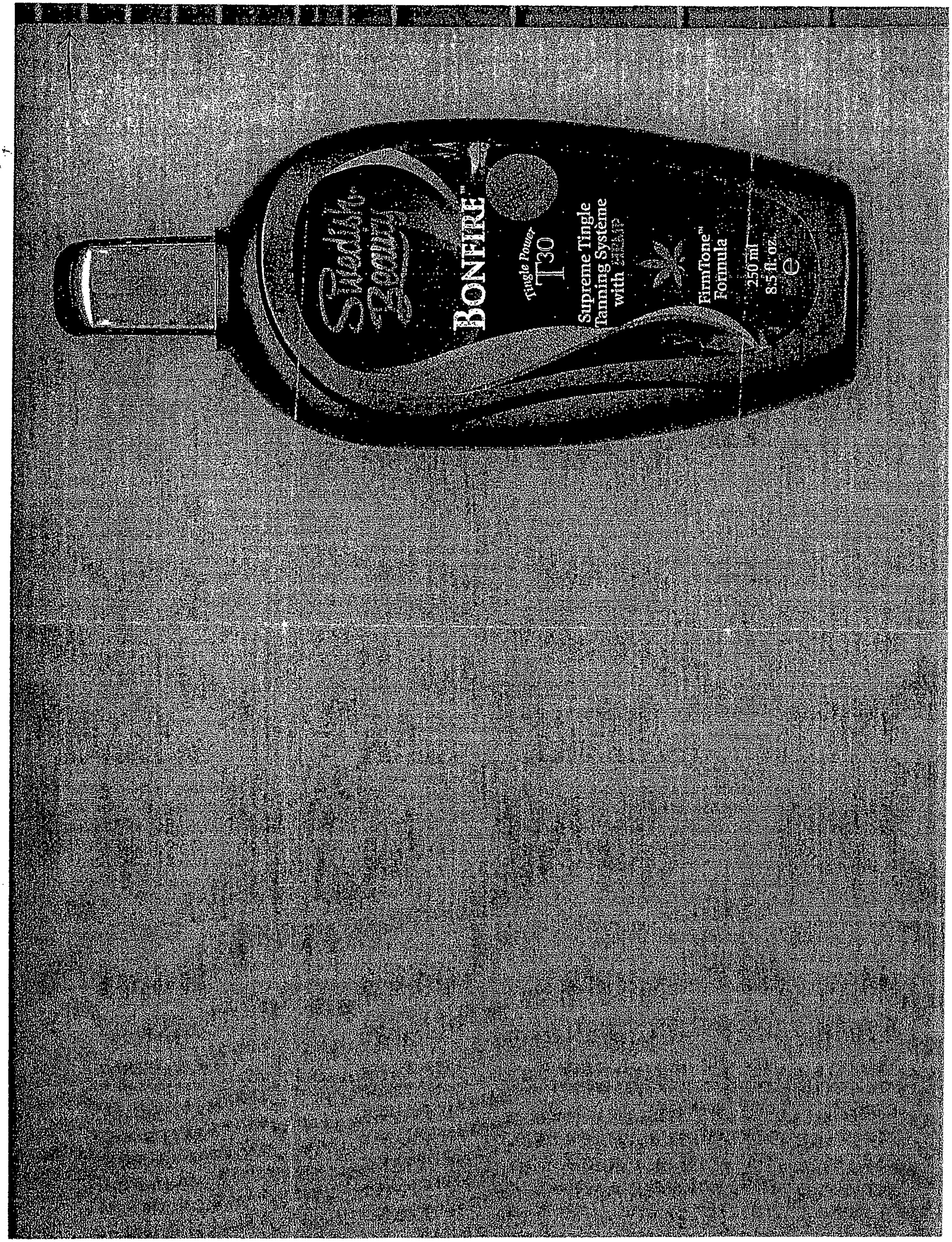
8/10/04

To Whom it May Concern:



On 7/26/04 I used your product, appropriately named "Bonfire." (Swedish Beauty) It was the most horrible experience of my life. I felt like I was stung by 10,000 bees and lit on fire, & it itched terribly; ALL OVER my body! Nothing I tried helped. Not a shower, not lotion or aloe vera gel. I was actually screaming, wishing I could rip my skin off. It got worse every hour, not better. It didn't wash off or wear off. My roomate had to take me to the emergency room. Thankfully, they were able to help me. I have no insurance. Not only do I expect a refund for the product, I also expect payment for the medical bill. (enclosed.) I hope we can work this out without having to involve lawyers. "Tingle" is NOT AN ACCURATE DESCRIPTION. It should say "Blow Torch". I do not have sensitive skin, or any allergies. And yes – I have a great BASE TAN as you can see from this photo.
[illegible]

Margaret Augustyniak


BONFIRE™
Tingle Power
T30
Supreme Tingle
Tanning Systeme
with
FirmTone™
Formula
250 ml
8.5 fl. oz.

DEPARTMENT OF HEALTH AND HUMAN SERVICES Public Health Service

Food and Drug Administration
College Park, MD 20740-38

April 07, 2005

Australian Gold Inc.
6270 Corporate Drive
Indianapolis, IN 46278

To Whom It May Concern:

This letter is to inform you that the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN) has received a report of an illness or injury allegedly associated with the use of one of your products. A consumer or health care professional either identified your firm in the adverse event report or the product label disclosed your firm as the manufacturer. There is no certainty that a reported adverse event can be attributed to a particular product or ingredient. The available information may not be complete enough to make this determination. A redacted copy of the Adverse Event Report (AER) is attached. To maintain confidentiality, the report has been redacted of any information that could be used to identify the consumer.

CFSAN has a voluntary adverse event reporting system to address adverse reports called CAERS (CFSAN Adverse Events Reporting System). The agency uses this system as a monitoring tool to identify potential public health issues that may be associated with the use of a particular product already in the marketplace. FDA is providing this information to notify you that an adverse event report has been received and, as with all such reports, will be processed according to our standard operating procedures. To assist CFSAN in protecting consumer health, we encourage you to share with us information that is relevant and useful concerning this adverse event or others that you may be aware of involving your product. Please send your information to: CAERS, (HFS-702), 5100 Paint Branch Parkway, College Park, MD 20740.The Agency may receive additional information about this adverse event in the future. If you wish to inquire about this information, you can receive copies of the publicly available information, if any, collected by the agency on this adverse event by filing a Freedom of Information Act (FOIA) request. All FOIA requests must be in writing and should be mailed to the following address: Food and Drug Administration, Division of FOI (HFI-35), 5600 Fishers Lane, Rockville, MD 20857. Or requests may be sent via fax to: (301) 443-1726. Additional information about FOIA can be found on FDA's web site, http://www.fda.gov/foi/foia2.htm and in FDA's FOIA implementation regulations, 21 CFR Part 20. Future correspondence regarding this letter should reference CAERS # 77108

If we can be of further assistance, please do not hesitate to contact us at 301-436-2405 or CAERS@cfsan.fda.gov.

Sincerely,

Kenneth J. Falci, Ph.D.
Director
Office of Scientific Analysis
and Support
Center for Food Safety
and Applied Nutrition

Enclosure

CFS/

U.S. Department of Health and Human Services

MEDWATCH

The FDA Safety Information and Adverse Event Reporting Program

For VOLUNTARY reporting of adverse events and product problems

Internet Submission - Page 1

CFSAN

Form Approved: OMB No. 0910-0291, Expires: 03/31/05
See OMB statement on reverse.

FDA USE ONLY
Triage unit sequence # 244143
77108

A. PATIENT INFORMATION

1. Patient Identifier: [redacted] In confidence
2. Age at Time of Event: 49 Years or Date of Birth: [redacted]
3. Sex: ☑ Female ☐ Male
4. Weight: 166 lbs or ___ kgs

B. ADVERSE EVENT OR PRODUCT PROBLEM

1. ☑ Adverse Event and/or ☑ Product Problem (e.g., defects/malfunctions)

2. Outcomes Attributed to Adverse Event (Check all that apply)
- ☐ Death: ______ (mo/day/yr)
- ☑ Life-threatening
- ☐ Hospitalization - initial or prolonged
- ☐ Disability
- ☐ Congenital Anomaly
- ☐ Required Intervention to Prevent Permanent Impairment/Damage
- ☑ Other: highly allergic

3. Date of Event (mo/day/year): 03/21/2005
4. Date of This Report (mo/day/year): 03/23/2005

5. Describe Event or Problem

i used a tanning lotion called my passion by austrailian gold and i broke out with severe hives all over my entire body.I had to go to a doctor and he gave a steroid to relieve the allergic reaction and he said that I was lucky that it didn't cause convultions because it is such a severe case.I contacted the Austraialian Gold cooperate headquarters and they said that there is nothing they can do. The [redacted] by [redacted] says that the exposure time was revoked. there website is [redacted] and you click on [redacted] then click on [redacted] then click on MyPassion and it pulls up the [redacted] report.

6. Relevant Tests/Laboratory Data, Including Dates

RECEIVED
MAR 24 2005
MEDWATCH CTU

7. Other Relevant History, Including Preexisting Medical Conditions (e.g., allergies, race, pregnancy, smoking and alcohol use, hepatic/renal dysfunction, etc.)

C. SUSPECT MEDICATION(S)

1. Name (Give labeled strength & mfr/labeler, if known)
#1 My Passion doesn't have a lable strength Australian Gold
#2

2. Dose, Frequency & Route Used
#1 body lotion daily Other
#2

3. Therapy Dates (If unknown, give duration) from/to (or best estimate)
#1 03/19/2005 03/21/2005
#2

4. Diagnosis for Use (Indication)
#1 none it's a tanning lotion
#2

5. Event Abated After Use Stopped or Dose Reduced?
#1 ☑ Yes ☐ No ☐ Doesn't Apply
#2 ☐ Yes ☐ No ☐ Doesn't Apply

6. Lot # (if known)
#1 not available
#2

7. Exp. Date (if known)
#1
#2

8. Event Reappeared After Reintroduction?
#1 ☐ Yes ☐ No ☑ Doesn't Apply
#2 ☐ Yes ☐ No ☐ Doesn't Apply

9. NDC# (For product problems only)

10. Concomitant Medical Products and Therapy Dates (Exclude treatment of event)

D. SUSPECT MEDICAL DEVICE

1. Brand Name: Australian Gold- My Passion
2. Type of Device: tanning lotion
3. Manufacturer Name, City and State: Austrailian gold, inc. Indianapolis Indiana
4. Model #
Lot #
Catalog #
Expiration Date (mo/day/yr)
Serial #
Other #: none of the above
5. Operator of Device
- ☐ Health Professional
- ☐ Lay User/Patient
- ☑ Other: applied by
6. If Implanted, Give Date (mo/day/yr)
7. If Explanted, Give Date (mo/day/yr)
8. Is this a Single-use Device that was Reprocessed and Reused on a Patient? ☐ Yes ☑ No
9. If Yes to Item No. 8, Enter Name and Address of Reprocessor
10. Device Available for Evaluation? (Do not send to FDA) ☑ Yes ☐ No ☐ Returned to Manufacturer on: ______ (mo/day/yr)
11. Concomitant Medical Products and Therapy Dates (Exclude treatment of event)

2005 MAR 30 AM 11:58

E. REPORTER (See confidentiality section on back)

1. Name and Address [redacted] Phone # [redacted]

[redacted]

2. Health Professional? ☐ Yes ☑ No
3. Occupation: Consumer/Non-Health Professional
4. Also Reported to:
- ☑ Manufacturer
- ☑ User Facility
- ☑ Distributor/Importer
5. If you do NOT want your identity disclosed to the manufacturer, place an "X" in this box: ☐

FDA Mail to: MEDWATCH 5600 Fishers Lane Rockville, MD 20852-9787 -or- FAX to: 1-800-FDA-0178

FORM FDA 3500 (9/03) Submission of a report does not constitute an admission that medical personnel or the product caused or contributed to the event.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

Food and Drug Administration
College Park, MD 20740

November 24, 2004

Swedish Beauty
6270 Corporate Drive
Indianapolis, IN 46278

To Whom It May Concern:

This letter is to inform you that the Food and Drug Administration's Center for Food Safety and Applied Nutrition (CFSAN) has received a report of an illness or injury allegedly associated with the use of one of your products. A consumer or health care professional either identified your firm in the adverse event report or the product label disclosed your firm as the manufacturer. There is no certainty that a reported adverse event can be attributed to a particular product or ingredient. The available information may not be complete enough to make this determination. A redacted copy of the Adverse Event Report (AER) is attached. To maintain confidentiality, the report has been redacted of any information that could be used to identify the consumer.

CFSAN has a voluntary adverse event reporting system to address adverse reports called CAERS (CFSAN Adverse Events Reporting System). The agency uses this system as a monitoring tool to identify potential public health issues that may be associated with the use of a particular product already in the marketplace. FDA is providing this information to notify you that an adverse event report has been received and, as with all such reports, will be processed according to our standard operating procedures. To assist CFSAN in protecting consumer health, we encourage you to share with us information that is relevant and useful concerning this adverse event or others that you may be aware of involving your product. Please send your information to: CAERS, (HFS-702), 5100 Paint Branch Parkway, College Park, MD 20740.The Agency may receive additional information about this adverse event in the future. If you wish to inquire about this information, you can receive copies of the publicly available information, if any, collected by the agency on this adverse event by filing a Freedom of Information Act (FOIA) request. All FOIA requests must be in writing and should be mailed to the following address: Food and Drug Administration, Division of FOI (HFI-35), 5600 Fishers Lane, Rockville, MD 20857. Or requests may be sent via fax to: (301) 443-1726. Additional information about FOIA can be found on FDA's web site, http://www.fda.gov/foi/foia2.htm and in FDA's FOIA implementation regulations, 21 CFR Part 20. Future correspondence regarding this letter should reference CAERS # 73747

If we can be of further assistance, please do not hesitate to contact us at 301-436-2405 or CAERS@cfsan.fda.gov.

Sincerely,

Kenneth J. Falci, Ph.D.
Director
Office of Scientific Analysis
and Support
Center for Food Safety
and Applied Nutrition

Enclosure

[redacted]

73747

[redacted]

November 15, 2004

Dear FDA,

I find the salon [redacted] neglect in giving me a certain lotion Swedish Beauty-Bonfire T-30 that was clearly unsafe and neglect once the issue happened even up to now to get a refund, additionally, they are not properly cleaning their beds which may lead to future neglect. I also find the manufacturer **Swedish Beauty** at fault for the packaging and warnings not sufficient for their product and for lack of training of this salon and employees on their product. I would like to consult your services as the FDA on taking further actions to avoid this in the future. I believe the product needs testing and investigation on your part before others are harmed as I was by it. This product is quite clearly some type of DRUG for addicted tanners as it has no after affects and does not make you tanner but burns the heck out of you when applied, turns you beet red and makes you tingle supposedly but it made my entire body SHAKE. It can't be safe and it can't be approved.

'04 NOV 17 AM 9:22

Incident Sept 27th, 2004

I went to [redacted] on this day and used bed #5.
After about 10 minutes of tanning, my right arm began burning me on the underside forearm. It was itching and burning. I shut the bed off early and got out to find my arm burnt and bright red. It hurt at this point immediately and I felt as if it were on fire. I left the tanning bed immediately in a rush and went to the front desk. I showed the girl what had happened with my arm and asked for an explanation how that happens. I told her I felt like I was on fire and that it was totally burnt. She asked me if I used lotion and I said yes but what did that matter as I use the same kind and had just used it earlier that week. I was my own lotion. She said it was not burnt and that it will go away. I was starting to get very nervous as it was very hot and very red and I told her she is wrong that it was burnt and what makes her think it will go away. I asked for the manager to call me and said to her that I hoped I did not have to go the emergency room, as it was so painful and red. I left and she laughed at me being so nervous about it and talked to another client about it. I went immediately to get aloe vera as it was burning very badly and I thought I would get blisters. I put aloe vera on it and within 1 ½ hours it was gone completely. The next day I had no affects of a burn at all and I thought this was very odd. (Come to find out it had to be the affects of someone prior to me being in the bed with some type, maybe the same Tingle product. This affects the [redacted] as they are either not cleaning or did not clean properly the tanning bed. If it can have this type of affect on someone second hand you can only imagine what I was to experience when I applied this lotion unknowingly. I believe the employee knew that this is what happened and this why she said " you are not burnt it will go away". Had she told me any of this at the time, I would not have had incident 2. I thought she was crazy at the time as I was feeling burnt and my arm was clearly VERY red)..

Incident Sept 29th, 2004

I went to [redacted] on this day; I must have left my lotion there the other day in leaving in a hurry so I asked to purchase some lotion. I at this point thought maybe I was imagining the burn the other day as it was gone, I intended to apologize to the associate and find out how that could be that it disappeared, she was not there. It was someone I never saw before there. The Associate was on the phone from the time I came in to the time I left. I asked for some "tanning lotion" and gave me some from the wall of like 6 types of lotions and "asked is this okay?". I said "I don't know you tell me?" and she said, "it's the best" so I gave her $20 for the $5 package. She had no change so she said she would give it to me upon leaving (and she didn't get off the phone the whole time). I proceeded to tanning room [redacted] to put this lotion on my body then face as I would my normal lotion. Less than 1 minute later before even making it to the tanning bed, my face was quite literally on fire it was beet red and the heat was unbearable. I never went into the bed but looked in the mirror to find my entire face beet red and I dressed immediately only with pants and my jacket (forgoing my shirt, shoes etc). I ran to the front desk where the associate was still on the phone and I asked her to look at my face and what in the world did she give me. I was in a panic now, she said nothing but just looked at me and said nothing. I ran then to the restroom and removed my jacket and began frantically washing my face, chest and arms as fast as I could. I did not get any relieve from this. I expected the associate to come back and check on me, she never did. I then after several washes, realized she was not coming back to check on me and I wanted to get out of there to shower it off me. I went again to the front desk, and asked her what she gave me, she was still on the phone and she said something like that's what it's supposed to do with a smirk on her face. She offered me no recommendations or understanding as to what was on my face and body. I told her I needed to leave immediately to wash it off as I was on fire. I told her I expected a call from the owner/manager and left right away. She never got off the phone to address me. I went home and jumped immediately into the shower and used exfoliate to scrub it off. I got no relief from doing this. After getting out of the shower, I realized it was getting worse and took photos, which I will send. I then called [redacted] and asked for the owners phone number, she told me she's right here and I spoke with her. I asked her what in the world they gave me. She said that I asked for the best lotion and I got it. I told her I have no idea what she

November 15, 2004
Page 3

gave me but I asked for a tanning lotion and had no knowledge of the type of lotion she gave me and I demanded her to tell me the details of what I was given. I told her I was literally on fire, beet red and that by this point my body was shaking. She told me "I was not shaking but tingling" (quite sarcastically I might add). I told her "I was not tingling, my entire body was shaking from the blood apparently raising to my skin as this lotion apparently was intended to do according to her" (she had just told me that this was the purpose matter of factly.. I asked her why I was given this as I am white, I had not been tanning regularly and I did not request this type of lotion I never heard of it and don't know why someone would even want to do this to their body. She said (quite sarcastically) "You asked her for the best, this is the best". I repeated the conversation above, that I did not even know what this is and that I asked for tanning lotion and she gave me this and said it was the best, I never ever knew such a lotion exsisted. I still can't imagine who uses this to torture their body with. She proceeded to tell me sarcastically that I made it worse by showering and that it's intended for me to go right into the tanning bed. I asked her how in the world was I supposed to sit in a tanning bed when I was already on fire. If indeed I made it worse by showering, the original associate had every opportunity to tell me and give me some advise-she told me NOTHING. At the end of the call I told her I was never coming back there and asked for a refund on my monthly membership that I joined on Sep 20th (and went only 3 times tanning) and she flat out refused. I then hung up. Later that night I called back and left a message as I remembered I never got my change from the purchase of this lotion so I left the message that since she said I am not getting my membership money back she at least owes me $15 change without a doubt and the $5 for the lotion as I was not paying for it. I also said I wanted the manager to call me the next day and left all my numbers. No call was received. The next morning 9/30 I called to get the owners name, I was told it was [redacted] I said than who would it have been that I spoke to the night prior that claimed to be the owner, she said it was [redacted] I said I have a serious circumstance which I need to speak to the owner on. She said (sarcastically) "for your serious circumstance, you can talk to [redacted] She handles everything".

Sep 30 after advise from another tanning salon owner I attempted one more try at getting to the owner before doing anything else. I called to say that before I take any other actions I wanted to make certain the owner was aware of my situation (since at this point I really just wanted my money back I was owed and to be heard). I was unsure if the owner knew and didn't want him to be surprised by it. I received a callback from [redacted] the manager with an attitude from the start saying I can't speak to the owner that I needed to go through her only. I asked if the owner was aware and refusing to speak with me, she would not answer me. After several times of my asking that question, she told me that her father is the owner and "he knows nothing about the business, I handle everything you need to go through me" very much with an attitude and anger from her. I told her I wanted to speak with him and make sure that he understood how severe I think this was and before I went to other alternatives, I wanted to make sure he knew. She would not listen to me and was speaking over me so I said then you leave me no choice but to have it investigated and I hung up and figured I had made my attempt to the owner and I was done with them. She called me back on the cell immediately, completely irate and went straight into "LISTEN LADY, DON'T YOU THREATEN ME". I shut the phone off at this point. She has not called again. This was 9/30.

There is a lot more to this story, it gets worse with how the manager handled it and refuses to allow me to speak with the owner. I am still unsure if the owner knows of the situation that occurred (Swedish Beauty has been unable to contact the owner directly either). I am not certain if they are a licensed salon. I am not sure if they are an authorized salon and getting the products from the distributor directly, but Swedish Beauty is looking into but doesn't even have the owners contact info. I asked Swedish Beauty to investigate the training of the salon/associates. They claim if they are not purchasing through a distributor they will take actions against them, as they are not selling their products accurately. This product cannot be sold in stores only licensed salons. I think that means they are not FDA approved. They claim that the package meets FDA approvals and that the ingredients themselves are FDA approved. I believe they have prior knowledge as to the harm this can cause to people. I have also since learned that MANY people are selling this product on Ebay including which I found one person selling over 3100 of these. How is it that Swedish Beauty can not find these people they have to be a top performer selling that much, yet they claim they sell only through licensed salons with training on the results of this product. There were many others with over 900 sales each.

You might think I should know from the name "bonfire" I can assure you the package looks just like Australian Gold a very safe reliable product that they also produce. I would not have known that bonfire was going to make me feel like I was in a bonfire and cause severe shaking. If I have coconut lotion, should I assume I could eat it? The agent from Swedish Beauty said she knows I did have severe shaking if indeed I went tanning only 2 times, and that I am fair skinned and put it all over my body and face. She said that I should never have been given that product. It sounds like they have had many cases of this. I have the original packaging from that day as well. I suggest that you undergo testing. This product caused severe heat in my body, I was beet red and my body was shaking from the blood rising to the top of my skin as I had applied generously and now see they say to on the back of the label. I had taken immediately 4 12-ounce glasses of water immediately since I knew I was loosing a lot of heat. Had I not done this I am not sure what would have happened.

I can be reached:
[redacted] work (best today up to 6pm)
home
cell

Please I am urging you to investigate immediately the product by distributing an unsafe product without proper follow up and training to this salon and they are liable. I do want this happening to others. I developed the photo's let me know if you need them in hard copy.

Please let me know if you are able to investigate this product.
[redacted]

Swedish Beauty
6270 Corporate Drive
Indianapolis, IN 46278
Phone: 888 715 0618
Fax: 877 777 0890
Thanks,
[redacted]

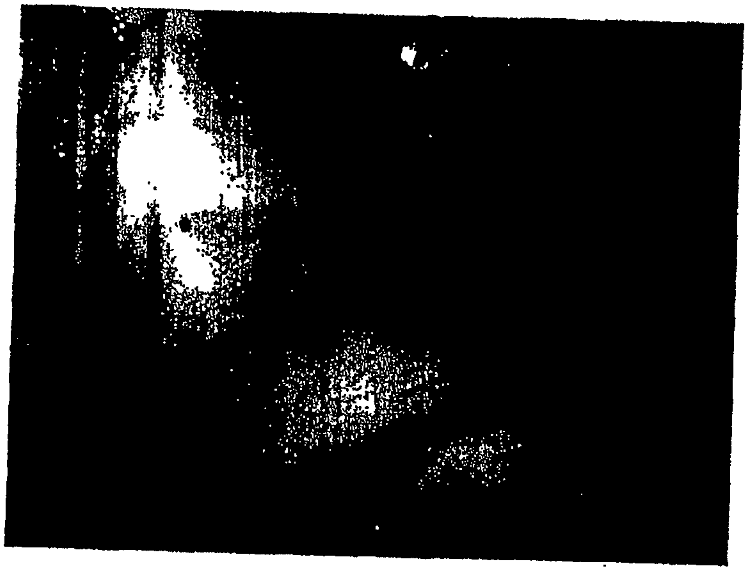


EXHIBIT B

Damages worksheet

Description and Allocated %	2005	2004	2003
	Allocated amounts for Internet abuse		
45% Customer service rep	$15,000.00	$15,000.00	$10,000.00
10% Executives, Sales Director	$40,000.00	$35,000.00	$40,000.00
5% rep time answering calls and complaints	$20,000.00	$20,000.00	$17,500.00
60%Trainers	$60,000.00	$36,000.00	$20,000.00
40% Travel expenses	$100,000.00	$90,000.00	$60,000.00
5% Sales Bonus	$12,000.00	$10,000.00	$8,000.00
Costs of trademarks and copyrights	$250,000.00	$300,000.00	$250,000.00
Contract negotiation fees	$5,000.00	$2,500.00	$2,500.00
Product training samples	$100,000.00	$100,000.00	$100,000.00
20 % Product training seminars	$60,000.00	$50,000.00	$20,000.00
5% Distributor/Salon council	$5,000.00	$5,000.00	$5,000.00
20% Tradeshow training	$50,000.00	$50,000.00	$55,000.00
Additional costs and lost customers			
	$717,000.00	$713,500.00	$588,000.00

$2,018,500.00